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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 3

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS AMAURI VASQUEZ  
ALVAREZ,

Defendant and Appellant.

A154630

(Marin County  
Super. Ct. No. SC048064)

Carlos Amauri Vasquez Alvarez<sup>1</sup> appeals the denial of his motion to vacate his conviction pursuant to Penal Code section 1473.7.<sup>2</sup> Vasquez contends his counsel at the time of his conviction failed to properly advise him of the adverse immigration consequences of his plea agreement and that the erroneous advisement damaged his ability to meaningfully understand, defend against, and knowingly accept those consequences. He argues the trial court incorrectly denied the motion on the basis it was untimely. We agree that the trial court incorrectly denied the motion on timeliness grounds and will remand to allow the trial court to consider the merits.

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<sup>1</sup> It appears from the record that the appellant uses traditional Spanish naming customs, so we will refer to him by his paternal surname in the spirit of clarity and brevity. We intend no disrespect by this practice.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise designated.

### **Factual and Procedural Background**

In April 1993, Vasquez entered a guilty plea to assault by means of force likely to produce great bodily injury and assault with a deadly weapon. (Former § 245, subd. (a)(1).) The court suspended imposition of sentence and placed him on a three-year probation conditioned on his serving 12 months in county jail with 93 days of credits for time served.

Following his conviction, immigration authorities commenced deportation proceedings. During those proceedings, the Immigration and Naturalization Service attorney mistakenly believed that Vasquez was not sentenced to one-year imprisonment and was thus not deportable. Due to that mistaken belief, deportation proceedings were terminated. During an asylum-revocation hearing the following year, it was determined that his conviction was not a “particularly serious crime.” In 1995, Vasquez received lawful permanent resident status.

But, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. § 1101 et seq.) (the Act) made Vasquez’s prior conviction an aggravated felony. (8 U.S.C. § 1101(a)(43)(F).) In 2000, Vasquez’s request for naturalization was denied based on his criminal history.

In December 2017, Vasquez moved to vacate his conviction pursuant to section 1473.7. Vasquez asserted the conviction exposed him to potential mandatory removal and argued he was eligible for relief under section 1473.7. He also claimed that counsel at the time of the plea was ineffective by failing to investigate and properly advise him of the immigration consequences of his plea and by failing to try to negotiate a plea that would mitigate immigration consequences. In support of the motion, Vasquez testified that if he was properly advised, he would have directed former counsel to focus his defense on mitigating the immigration consequences of his plea. This would have included negotiating for a 364-day sentence, thereby reducing the likelihood of asylum-revocation and his possible deportation after the Act.

The trial court denied Vasquez’s motion reasoning that before filing a motion under section 1473.7 a defendant would have to be subject to a deportation order. Vasquez timely appealed.

### **Discussion**

Section 1473.7 allows a person who is no longer in criminal custody to file a motion to vacate a conviction *or* sentence if it is legally invalid due to “prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual *or* potential adverse immigration consequences of a plea of guilty or nolo contendere.” (§ 1473.7, subd. (a)(1), italics added; *People v. Camacho* (2019) 32 Cal.App.5th 998, 1006.) “Section 1473.7 was designed to address the absence under California law of any means for a person who is no longer in criminal custody to challenge a conviction on the grounds they could not meaningfully understand its actual or potential immigration consequences. (Sen. Com. on Public Safety, Purpose of Assem. Bill No. 813 (2015–2016 Reg. Sess.) as amended June 22, 2015, p. 1.)” (*People v. Chen* (2019) 36 Cal.App.5th 1052, 1057.)

Here, the trial court concluded that a motion to vacate a conviction or sentence under section 1473.7 is precluded in the absence of “a notice to the defendant to appear in immigration court, or some other notice from immigration authorities that asserts this conviction or this sentence as a basis for removal[,]” or an issued removal order from immigration authorities.<sup>3</sup> As the People concede, this conclusion is incorrect. A notice from immigration authorities or a removal order are not prerequisites for relief. The statute specifically lists these circumstances as a basis for the court to deem a section

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<sup>3</sup> Section 1473.7, subdivision (b)(2) states: “A motion pursuant to paragraph (1) of subdivision (a) may be deemed untimely filed if it was not filed with reasonable diligence after the later of the following: [¶] (A) The moving party receives a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization. [¶] (B) Notice that a final removal order has been issued against the moving party, based on the existence of the conviction or sentence that the moving party seeks to vacate.”

1437.7 motion untimely *if* the motion is not filed with reasonable diligence after those events come into fruition. (§ 1473.7, subd. (b).)

Even though the superior court denied relief on the supposed prematurity of his motion, Vasquez argues that he is entitled to relief on the merits. We decline to consider the merits for the first time on appeal.

Although the trial court conducted an evidentiary hearing on Vasquez's motion, the court made no credibility determinations or factual assessment of the evidence. While we agree that former counsel was required to advise Vasquez of the immigration consequences of his plea (see *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1482), it is the purview of the trial court to determine Vasquez's credibility and whether he has established, by a preponderance of the evidence, the existence of any of the grounds for relief under section 1473.7. (See § 1473.7, subd. (e)(1).) Because the trial court based its holding only on the prematurity of Vasquez's section 1437.7 motion and did not make findings regarding the credibility of the testimony of Vasquez or other findings of fact, we are unable to decide whether the facts demonstrated deficient performance and resulting prejudice to Vasquez.

### **Disposition**

The order denying Vasquez's motion under section 1473.7 is reversed and this case is remanded to the trial court with directions to address the motion on the merits.

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Siggins, P. J.

WE CONCUR:

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Fujisaki, J.

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Wick, J.\*

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\* Judge of the Superior Court of Sonoma County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.